

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OFFICE OF THE CLERK

O'MELVENY & MYERS,
a Law Partnership,v. *Petitioner,*FEDERAL DEPOSIT INSURANCE CORPORATION as RE-
CEIVER for AMERICAN DIVERSIFIED SAVINGS BANK,
ADC FINANCIAL CORPORATION, AMERICAN DIVERSI-
FIED/WELLS PARK II, and AMERICAN DIVERSIFIED/
GATEWAY CENTER, *Respondents.*On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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Opinion of the Court of Appeals	Pet. App. 1a
Oral Decision of the District Court Granting Sum- mary Judgment	Pet. App. 17a
Written Order of the District Court Granting Summary Judgment	Pet. App. 20a
Order of the Court of Appeals Denying Petition for Rehearing	Pet. App. 22a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
05/12/89	6	COMPLAINT FOR PROFESSIONAL NEGLIGENCE; NEGLIGENT MISREPRESENTATION; BREACH OF FIDUCIARY DUTY; AND EQUITABLE INDEMNITY AND CONTRIBUTION (Filed on behalf of FSLIC, Case No. DV89-2877 TJH (KX) United States District Court, Central District)
07/13/89	10	ANSWER AND COUNTERCLAIM OF DEFENDANT AND COUNTERCLAIMANT O'MELVENY & MYERS TO COMPLAINT
08/08/89	13	ANSWER OF COUNTERDEFENDANTS FSLIC AS RECEIVER FOR ADSB, ET AL., TO COUNTERCLAIMS OF O'MELVENY & MYERS
02/09/90	20	STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW; PROPOSED ORDER (re: #18)
02/09/90	21	SUMMARY JUDGMENT (Proposed; Re #18)
02/15/90	22	PROOFS OF SERVICE OF NOTICE AND MOTION OF DEFENDANT FOR SUMMARY JUDGMENT OF DISMISSAL, OR IN THE ALTERNATIVE, FOR AN ORDER SPECIFYING CERTAIN ISSUES OF LAW AS ESTABLISHED AS AGAINST PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION; DECLARATIONS OF JERRY W. CARLTON AND RICHARD ZIMMERMAN; STATEMENT OF UNCONTROVERTED FACTS; PROPOSED ORDER AND SUMMARY JUDGMENT

Date	No.	PROCEEDINGS
03/16/90	24	OPPOSITION BY PLAINTIFFS TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANT O'MELVENY & MYERS; DECLARATIONS OF ALAN J. BERKELEY, GARY HINMAN AND CATHLEEN A. CARLSON IN SUPPORT THEREOF
03/16/90	25	PLAINTIFFS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT
03/16/90	26	PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
04/02/90	27	REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT O'MELVENY & MYERS; DECLARATIONS OF JERRY W. CARLTON AND GREGORY R. SMITH IN SUPPORT THEREOF
05/23/90	32	NOTICE OF ENTRY OF FINAL JUDGMENT
06/18/90	33	NOTICE OF APPEAL

**U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
06/29/92	24	Opinion (reversing district court grant of summary judgment)
07/06/92	25	MOTION OF APPELLEE O'MELVENY & MYERS FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC; FORM OF PROPOSED ORDER
07/27/92	26	APPELLEE'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC
6/30/93	64	Ninth Circuit Court of Appeals Order Denying Petition for Rehearing

[Filed May 12, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

—
No. CV 89-2877 TJH (KX)

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR AMERICAN DIVERSIFIED SAVINGS
BANK; ADC FINANCIAL CORPORATION, a California
corporation; AMERICAN DIVERSIFIED/WELLS PARK II,
a California Limited Partnership, formerly known as
American Diversified/Wells Park; and AMERICAN DI-
VERSIFIED/GATEWAY CENTER, a California limited
partnership,

Plaintiffs,

vs.

O'MELVENY & MYERS,
a law partnership,

Defendant.

—
**COMPLAINT FOR PROFESSIONAL NEGLIGENCE;
NEGLIGENT MISREPRESENTATION;
BREACH OF FIDUCIARY DUTY;
AND EQUITABLE INDEMNITY AND CONTRIBUTION**
JURY TRIAL DEMANDED

Plaintiff Federal Savings and Loan Insurance Corporation ("FSLIC") for its complaint alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1345, 12 U.S.C. § 1730(k)(1), and the doctrine of pendent jurisdiction.

2. Venue is proper in this the Central District of California under 28 U.S.C. § 1391 and is proper in the Santa Ana Division thereof under 28 U.S.C. § 1393(a). The claims asserted in this complaint arose in said district and said division in that the contract with defendant was entered into in Orange County, California, and the professional services at issue in this litigation were performed in Orange County, California. The defendant is now and at all relevant times was a resident of and transacted substantial business in Orange County, California.

PARTIES

3. FSLIC is a corporation and an instrumentality of the United States, authorized to sue by act of Congress. 12 U.S.C. § 1725(c). FSLIC operates under the direction of the Federal Home Loan Bank Board (the "Bank Board"), and has its principal office in the District of Columbia. 12 U.S.C. § 1725(a). FSLIC has been charged by Congress with responsibility to maintain the financial stability of the savings and loan industry throughout the United States and to protect the creditors and depositors of savings and loan institutions through the creation, maintenance and protection of the FSLIC fund. 12 U.S.C. §§ 1724, 1726(a), (b), 1729(f), 1730(m). FSLIC maintains this action as part of its duties and responsibilities to maintain and protect the FSLIC fund and for the benefit of depositors and creditors of American Diversified Savings Bank.

4. American Diversified Savings Bank ("ADSB") was a savings and loan association chartered under the laws of the State of California, whose deposits were insured by FSLIC. At all relevant times, ADSB had its principal place of business in Costa Mesa, California.

5. On February 14, 1986, the Bank Board determined that ADSB was insolvent, had substantially dissipated its assets due to violations of law and unsafe and unsound practices, and was in an unsafe and unsound condition to

transact business. The Bank Board appointed FSLIC as the Conservator for ADSB.

6. FSLIC took possession of ADSB on February 14, 1986. As Conservator, FSLIC succeeded to the rights, title, powers and privileges of ADSB and to the rights, powers and privileges of the directors and officers of ADSB. 12 U.S.C. § 1729(c)(1)(B)(II); 12 C.F.R. Part 548.2(b).

7. On June 3, 1988, the Bank Board appointed FSLIC as Receiver for ADSB. As receiver, FSLIC succeeded to the rights, title, powers and privileges of the directors and officers of ADSB. 12 U.S.C. § 1729(c)(1)(B)(II).

8. American Diversified Capital Corporation ("ADCC") is and at all times has been a corporation, organized and existing under the laws of the State of California, wholly owned by ADSB. ADCC is classified as a service corporation of ADSB and, at all relevant times, its operations were subject to regulation by FSLIC. At all relevant times, ADCC had its principal place of business in Costa Mesa, California.

9. ADC Financial Corporation ("ADC Financial") is, and at all relevant times, has been a corporation, organized and existing under the laws of the State of California, wholly owned by ADCC. ADC Financial is classified as a service corporation of ADSB and, at all relevant times, its operations were subject to regulation by FSLIC. ADC Financial is the general partner of American Diversified/Wells Park II, a California Limited Partnership, formerly known as American Diversified/Wells Park, a California Limited Partnership ("Wells Park"). ADC Financial is also the general partner of American Diversified/Gateway Center, a California Limited Partnership ("Gateway Center"). Wells Park and Gateway Center are, and at all relevant times have been, limited partnerships organized and existing under the laws of the State of California. At all relevant times, ADC Financial, Wells Park and Gate-

way Center had their principal place of business in Costa Mesa, California.

10. Defendant O'Melveny & Myers is, and at all relevant times was, a law partnership residing in and doing business in Orange County, California. In 1985, the Orange County office of O'Melveny & Myers was retained by ADSB, ADC Financial, Wells Park and Gateway Center as special securities counsel and tax counsel with respect to the offering to potential investors of limited partnership units in Wells Park and Gateway Center.

FACTUAL ALLEGATIONS PERTAINING TO WELLS PARK

11. Wells Park was and is involved in the acquisition, rehabilitation and operation of a commercial building located in Portland, Oregon, the acquisition, development and operation of an apartment complex in Nashville, Tennessee, and the acquisition and operation of an apartment complex in Tampa, Florida.

12. Limited partnership units in Wells Park were offered for sale to investors pursuant to a Private Placement Memorandum dated October 17, 1985 (the "Wells Park PPM"). Pursuant to the Wells Park PPM, on or about December 31, 1985, Wells Park sold 79 limited partnership units at a price per unit of \$100,000 to unaffiliated investors (the "Wells Park Investors"), and sold 21 units at a price per unit of \$90,500 to an affiliate of ADC Financial, American Diversified Technical Corporation I, a wholly owned subsidiary of ADCC ("Wells Park Offering").

13. As special securities and tax counsel for the Wells Park Offering, defendant O'Melveny & Myers was required to conduct and participate in an investigation into the business operations, prospects and financial accounting and management control systems of Wells Park, known as "due diligence" investigation, and participated in the

preparation of the Wells Park PPM, including but not limited to drafting substantial portions thereof and reviewing financial statements and other documents included therein.

14. The Wells Park PPM prepared by defendant and others projected the image of Wells Park as a well-run partnership whose general partner was experienced with similar limited partnerships that had been successful. It projected the image of ADC Financial as a sound business affiliated with a major savings and loan association with a very substantial net worth. The PPM contained financial statements of ADC Financial that indicated that ADC Financial's total assets of \$8,510,634 included a \$4,975,000 certificate of deposit with ADSB. The Wells Park PPM stated that ADSB had informed ADC Financial that "current regulations and circumstances would permit ADSB to provide [ADC Financial] and affiliates with funds projected to be needed by them from ADSB." The Wells Park PPM contained projections based on prior performance of its general partner, ADC Financial, and affiliated entities in other limited partnerships, which suggested that these limited partnerships were financially sound, and created the impression that ADC Financial was a seasoned general managing partner of comparable limited partnerships with a strong track record.

15. The statements particularized in paragraph 14 above were false and misleading when made by defendants and no adequate or reasonable basis existed to justify or support such statements. Plaintiffs are informed and believe and thereupon allege that the true facts, which were recklessly disregarded by defendant O'Melveny & Myers, who failed to disclose them when under a duty to do so, are as follows:

(a) ADSB was at the time of the Wells Park Offering, and had been at least since the close of its most recent fiscal year, ended June 30, 1985, in serious financial difficulties. As a result: (1) there

was a significant risk that ADSB would be unable or unwilling to infuse its subsidiaries, and through them its second tier subsidiaries like ADC Financial, with additional capital contributions; (2) there was a significant risk that ADSB would be unable or unwilling to make loans to its subsidiaries, second tier subsidiaries, or other affiliates; (3) ADSB faced a serious risk of failing as a going concern; (4) ADSB faced a serious risk of being placed in receivership or conservatorship by the FSLIC; (5) there was a real danger that, if ADSB were to fail or be placed in receivership or conservatorship, its affiliates, including Wells Park, would also fail for numerous reasons; and (6) if ADSB were to fail or be placed in receivership, there was a significant risk that ADC Financial would lose the uninsured portion of the \$4,975,000 it had in its certificate of deposit with ADSB.

(b) ADSB and its auditors were delinquent in producing audited financial statements for the year ended June 30, 1985, which delinquency was an indication of serious record-keeping, management and financial shortcomings at ADSB.

(c) ADSB was in violation of federal regulations and in violation of a regulatory agreement entered into between ADSB and CDSL on or about October 14, 1984, which restricted ADSB's aggregate direct investments, including its investments in its wholly-owned service corporations, to 60% of assets, and required it to maintain a net worth of no less than 5% of total assets, and was in violation of various other regulatory restrictions, an indication of serious management, accounting and financial shortcomings; and that these restrictions would prohibit or restrict ADSB from further capital contributions to its subsidiaries or second tier subsidiaries that might be necessary to maintain those entities as viable concerns.

(d) ADSB was in violation of its duty to keep adequate records, indicating a serious failure in management, financial and accounting controls.

(e) The financial statements of ADC Financial contained in the PPM were false and misleading because (1) ADC Financial's net worth was dependent upon a \$4,975,000 certificate of deposit with ADSB, yet the financial statements failed to disclose the problems with ADSB described above, including the material risk associated with the uninsured certificate of deposit; (2) the balance sheet contained in the financial statements for ADC Financial was outdated; (3) Arthur Young & Company ("Arthur Young"), who prepared the balance sheet, had not authorized ADC Financial to use it in connection with the Wells Park private placement.

(f) ADC Financial had begun marketing another private placement offering for American Diversified/Hickory Trace, a California Limited Partnership ("Hickory Trace"), pursuant to a private placement memorandum dated August 1, 1985 ("Hickory Trace PPM"), which offering was withdrawn in December, 1985, prior to the Wells Park sale of limited partnership units on December 31, 1985, because of the insistence of outside securities counsel that potential investors be provided with audited financial statements of ADSB for its most recent fiscal year, which statements were unavailable.

16. In light of the facts set forth in paragraph 15 (a)-(f), the purchase of the Wells Park limited partnership units involved a very high degree of risk.

17. The adverse information not disclosed by defendant was material information as to which a reasonable person would attach importance in making the decision whether to purchase the Wells Park limited partnership units.

18. Plaintiffs are informed and believe and thereupon allege that defendant O'Melveny & Myers, as special securities counsel and tax counsel for the Wells Park Offering, should have discovered the facts set forth in paragraph 15 above in the exercise of reasonable diligence and caused said facts to be set forth in the Wells Park PPM. Instead, defendant O'Melveny & Myers failed to make any significant inquiry into the matters set forth in paragraph 15 above. Among other things, defendant O'Melveny & Myers failed to make any inquiry whatsoever with the outside public auditors for ADSB, ADCC or ADC Financial, failed to make any inquiry whatsoever with prior outside securities counsel for ADC Financial, and failed to make any inquiry whatsoever into the financial condition or regulatory status of ADSB and its service corporation subsidiaries.

19. On or about October 17, 1986, ADC Financial, Wells Park and FSLIC, then Conservator of ADSB, offered to the Wells Park Investors an opportunity to rescind their investments in Wells Park by selling their Wells Park limited partnership units to Wells Park ("Wells Park Rescission Offer"). Pursuant to the Wells Park Rescission Offer, rescinding investors would receive in exchange for their units, the principal amount of the consideration paid by said investor, plus interest thereon.

20. Each of the Wells Park Investors accepted the Wells Park Rescission Offer and transferred his or her limited partnership units to ADC Financial. As part of said rescission, each Wells Park Investor also assigned to FSLIC, as Conservator for ADSB, all rights, causes of action and claims, in connection with the Wells Park Offering, which the investor may have against all persons involved in the Wells Park Offering with respect to any violations of the Securities Act of 1933 (the "1933 Act"), the Securities Exchange Act of 1934 (the "1934 Act"), or the securities laws or common law of any state.

21. Defendant O'Melveny & Myers has entered into written agreements tolling the statute of limitations for

claims arising out of the Wells Park Offering for the period December 23, 1986 through May 15, 1989.

FACTUAL ALLEGATIONS PERTAINING TO GATEWAY CENTER

22. Gateway Center was and is involved with the acquisition, rehabilitation and operation of a commercial property located in San Francisco, California, the acquisition, development and operation of an apartment complex located in Palmdale, California, and the acquisition and operation of an office building located in El Paso, Texas.

23. Limited partnership units in Gateway Center were offered for sale to investors pursuant to a private placement memorandum dated November 25, 1985 (the "Gateway Center PPM"). Pursuant to the Gateway Center PPM, on or about December 31, 1985, Gateway Center sold 61 limited partnership units at a price per unit of \$100,000 to unaffiliated investors (the "Gateway Center Investors"), sold 48.25 units at a discount to an affiliate of ADC Financial, American Diversified Technical Corporation II, and sold 10.75 units at a discount to American Diversified Executive Partnership, a California Limited Partnership, the general partner of which is ADCC and the limited partners of which are current or former employees of ADSB and its affiliates ("Gateway Center Offering").

24. As special securities and tax counsel for the Gateway Center Offering, defendant O'Melveny & Myers conducted or participated in an investigation into the business operations, prospects and financial accounting and management control systems of Gateway Center, known as "due diligence" investigation, and participated in the preparation of the Gateway Center PPM, including but not limited to drafting substantial portions thereof and reviewing financial statements and other documents included in the Gateway Center PPM.

25. The Gateway Center PPM prepared by defendant and others projected the image of Gateway Center as a well-run partnership whose general partner was experienced with, and had a track record of, similar limited partnerships that had been successful. It projected the image of ADC Financial as a sound business affiliated with a major savings and loan association with a very substantial net worth. The PPM contained financial statements of ADC Financial that indicated that ADC Financial's total assets of \$8,510,634 included a \$4,975,000 certificate of deposit with ADSB. The Gateway Center PPM stated that ADSB had informed ADC Financial that "current regulations and circumstances would permit ADSB to provide [ADC Financial] and affiliates with funds projected to be needed by them from ADSB." The Gateway Center PPM contained projections based on prior performance of its general partner, ADC Financial, and affiliated entities in other limited partnerships, which suggested that these limited partnerships were financially sound, and created the impression that ADC Financial was a seasoned general managing partner of comparable limited partnerships with a strong track record.

26. The statements particularized in paragraph 25 above were false and misleading when made by defendants and no adequate or reasonable basis existed to justify or support such statements. Plaintiffs are informed and believe and thereupon allege that the true facts, which were recklessly disregarded by defendant O'Melveny & Myers, who failed to disclose them when under a duty to do so, are as follows:

(a) ADSB was, at the time of the Gateway Center Offering and had been at least since the close of its most recent fiscal year, ended June 30, 1985, in serious financial difficulties. As a result: (1) there was a significant risk that ADSB would be unable or unwilling to infuse its subsidiaries, and through them its second tier subsidiaries like ADC Financial, with

additional capital contributions; (2) there was a significant risk that ADSB would be unable or unwilling to make loans to its subsidiaries, second tier subsidiaries, or other affiliates; (3) ADSB faced a serious risk of failing as a going concern; (4) ADSB faced a serious risk of being placed in receivership or conservatorship by the FSLIC; (5) there was a real danger that, if ADSB were to fail or be placed in receivership or conservatorship, its affiliates, including Gateway Center, would also fail for numerous reasons; and (6) if ADSB were to fail or be placed in receivership or conservatorship, there was a significant risk that ADC Financial would lose the uninsured portion of the \$4,975,000 it had in its certificate of deposit with ADSB.

(b) ADSB and its auditors were delinquent in producing audited financial statements for the year ended June 30, 1985, which delinquency was an indication of serious record-keeping, management and financial shortcomings at ADSB.

(c) ADSB was in violation of federal regulations and in violation of a regulatory agreement entered into between ADSB and CDSL on or about October 14, 1984, which restricted ADSB's aggregate direct investments, including its investments in its wholly-owned service corporations, to 60% of assets, and required it to maintain a net worth of no less than 5% of total assets, and was in violation of various other regulatory restrictions, an indication of serious management, accounting, and financial shortcomings; and that these restrictions would prohibit or restrict ADSB from further capital contributions to its subsidiaries or second tier subsidiaries that might be necessary to maintain those entities as viable concerns.

(d) ADSB was in violation of its duty to keep adequate records, indicating a serious failure in management, financial and accounting controls.

(e) The financial statements of ADC Financial contained in the PPM were false and misleading because (1) ADC Financial's net worth was dependent upon a \$4,975,000 certificate of deposit with ADSB, yet the financial statements failed to disclose the problems with ADSB described above, including the material risk associated with the uninsured certificate of deposit; (2) the balance sheet contained in the financial statements for ADC Financial was outdated, (3) Arthur Young, who prepared the balance sheet, had not authorized ADC Financial to use it in connection with the Gateway Center private placement.

(f) ADC Financial had begun marketing the Hickory Trace private placement offering, pursuant to the Hickory Trace PPM, which offering was withdrawn prior to the Gateway Center sale of limited partnership units on December 31, 1985, because of the insistence of outside securities counsel that potential investors be provided with audited financial statements of ADSB for its most recent fiscal year, which statements were unavailable.

27. In light of the facts set forth in paragraph 26(a)-(f), the purchase of the Gateway Center limited partnership units involved a very high degree of risk.

28. The adverse information not disclosed by defendant was material information as to which a reasonable person would attach importance, in making the decision whether to purchase the Gateway Center limited partnership units.

29. Plaintiffs are informed and believe and thereupon allege that defendant O'Melveny & Myers, as special securities counsel and tax counsel for the Gateway Center offering, should have discovered the facts set forth in paragraph 26 above in the exercise of reasonable diligence and caused said facts to be set forth in the Gate-

way Center PPM. Instead, defendant O'Melveny & Myers failed to make any significant inquiry into the matters set forth in paragraph 26 above. Among other things, defendant O'Melveny & Myers failed to make any inquiry whatsoever with the outside public auditors for ADSB, ADCC or ADC Financial, failed to make any inquiry whatsoever with prior outside securities counsel for ADC Financial, and failed to make any inquiry whatsoever into the financial condition or regulatory status of ADSB and its service corporation subsidiaries.

30. On or about October 15, 1986, plaintiffs ADC Financial, Gateway Center and FSLIC, then Conservator of ADSB, offered to the Gateway Center Investors an opportunity to rescind their investments in Gateway Center by selling their Gateway Center limited partnership units to Gateway Center ("Gateway Center Rescission Offer"). Pursuant to the Gateway Center Rescission Offer, rescinding investors would receive, in exchange for their units, the principal amount of the consideration paid by said investor, plus interest thereon.

31. Each of the Gateway Center Investors accepted the Gateway Center Rescission Offer and transferred his or her limited partnership units to ADC Financial. As part of said rescission, each Gateway Center Investor assigned to FSLIC, as Conservator for ADSB, all rights, causes of action and claims, in connection with the Gateway Center Offering, which the investor may have against all persons involved in the Gateway Center Offering with respect to any violations of the 1933 Act, the 1934 Act and the securities laws or common laws of any state.

32. Defendant O'Melveny & Myers has entered into written agreement tolling the statute of limitations for claims arising out of the Gateway Center Offering for the period December 23, 1986 through May 15, 1989.

COUNT I

PROFESSIONAL NEGLIGENCE IN CONNECTION WITH THE WELLS PARK OFFERING

33. Plaintiffs FSLIC, ADC Financial and Wells Park incorporate by this reference the allegations set forth in paragraphs 1 through 21, inclusive.

34. In or about October, 1985, ADSB, ADC Financial and Wells Park retained defendant O'Melveny & Myers as special securities counsel and tax counsel for the Wells Park Offering.

35. As special securities counsel and special tax counsel for the Wells Park Offering, O'Melveny & Myers owed to FSLIC, ADC Financial, Wells Park, and the Wells Park Investors the duty to use such skill, prudence and diligence as other members of the legal profession commonly possess and exercise. As attorneys specializing in securities laws, O'Melveny & Myers owed to FSLIC, ADC Financial, Wells Park and the Wells Park Investors, such skill, prudence and diligence as meets the standards of knowledge and skill of securities specialists.

36. In the conduct described herein, O'Melveny & Myers failed to exercise such skill, prudence and diligence.

37. As a proximate result of the negligent conduct of O'Melveny & Myers, plaintiffs FSLIC, ADC Financial and Wells Park and the Wells Park Investors suffered damages in amounts which have not yet been ascertained.

COUNT II

PROFESSIONAL NEGLIGENCE IN CONNECTION WITH THE GATEWAY CENTER OFFERING

38. Plaintiffs FSLIC, ADC Financial and Gateway Center incorporate by this reference the allegations set

forth in paragraphs 1 through 10 and paragraphs 22 through 32, inclusive.

39. In or about October, 1985, ADSB, ADC Financial and Gateway Center retained defendant O'Melveny & Myers as special securities counsel and special tax counsel for the Gateway Center offering.

40. As special securities counsel and special tax counsel for the Gateway Center Offering, O'Melveny & Myers owed to FSLIC, ADC Financial, Gateway Center and the Gateway Center Investors the duty to use such skill, prudence and diligence as other members of the legal profession commonly possess and exercise. As attorneys specializing in securities laws, O'Melveny & Myers owed to FSLIC, ADC Financial, Gateway Center, and the Gateway Center Investors, such skill, prudence and diligence as meets the standards of knowledge and skill of securities specialists.

41. In the conduct described herein, O'Melveny & Myers failed to exercise such skill, prudence and diligence.

42. As a proximate result of the negligent conduct of O'Melveny & Myers, plaintiffs FSLIC, ADC Financial and Gateway Center and the Gateway Center Investors suffered damages in amounts which have not yet been ascertained.

COUNT III

NEGLIGENT MISREPRESENTATION IN CONNECTION WITH THE WELLS PARK OFFERING

43. Plaintiffs FSLIC, ADC Financial and Wells Park incorporate by this reference the allegations set forth in paragraphs 1 through 21, inclusive.

44. Among the direct and proximate causes of the misrepresentations and omissions to state material facts

set forth above was the negligence and carelessness of defendant O'Melveny & Myers.

45. At the time of said misrepresentations and omissions, the Wells Park Investors were ignorant of their falsity. In reliance on said representations and omissions, and in ignorance of the true facts, the Wells Park Investors were induced to and did purchase Wells Park limited partnership units. By reason thereof, the Wells Park Investors suffered damages in an amount which has not yet been ascertained, the claims pertaining to which have been assigned by the Wells Park Investors to plaintiff FSLIC.

COUNT IV

NEGLIGENT MISREPRESENTATION IN CONNECTION WITH THE GATEWAY CENTER OFFERING

46. Plaintiffs, FSLIC, ADC Financial and Gateway Center incorporate by this reference the allegations set forth in paragraphs 1 through 10, and 22 through 32, inclusive.

47. Among the direct and proximate causes of the misrepresentations and omissions to state material facts set forth above was the negligence and carelessness of defendant O'Melveny & Myers.

48. At the time of said misrepresentations and omissions, the Gateway Center Investors were ignorant of their falsity. In reliance on said representations and omissions, and in ignorance of the true facts, the Gateway Center Investors were induced to and did purchase Gateway Center limited partnership units. By reason thereof, the Gateway Center Investors suffered damages in an amount which has not yet been ascertained, the claims pertaining to which have been assigned by the Gateway Center Investors to plaintiff FSLIC.

COUNT V

BREACH OF FIDUCIARY DUTY IN CONNECTION
WITH THE WELLS PARK OFFERING

49. Plaintiffs FSLIC, ADC Financial and Wells Park incorporate by this reference the allegations set forth in paragraphs 1 through 21, inclusive.

50. Defendant O'Melveny & Myers owed a fiduciary duty of due care to FSLIC, ADC Financial, Wells Park and the Wells Park Investors. Plaintiffs are informed and believe and thereupon allege that defendant violated this fiduciary duty by failing to disclose material facts in the Wells Park PPM.

51. Plaintiffs are informed and believe and thereupon allege that, as a consequence of the breach of fiduciary duty by defendant, plaintiffs FSLIC, ADC Financial and Wells Park, and the Wells Park Investors have been damaged in amounts which have not yet been ascertained.

COUNT VI

BREACH OF FIDUCIARY DUTY IN CONNECTION
WITH THE GATEWAY CENTER OFFERING

52. Plaintiffs FSLIC, ADC Financial and Gateway Center incorporate by this reference the allegations set forth in paragraphs 1 through 10 and paragraphs 22 through 32, inclusive.

53. Defendant O'Melveny & Myers owed a fiduciary duty of due care to FSLIC, ADC Financial, Gateway Center and the Gateway Center Investors. Plaintiffs are informed and believe and thereupon allege that defendant violated this fiduciary duty by failing to disclose material facts in the Gateway Center PPM.

54. Plaintiffs are informed and believe and thereupon allege that, as a consequence of the breach of fiduciary duty by defendant, plaintiffs FSLIC, ADC Financial and

Gateway Center, and the Gateway Center Investors have suffered damages in amounts which have not yet been ascertained.

COUNT VII

COMPARATIVE EQUITABLE INDEMNITY AND
CONTRIBUTION IN CONNECTION WITH THE
WELLS PARK OFFERING

55. Plaintiffs FSLIC, ADC Financial and Wells Park incorporate by this reference the allegations set forth in paragraphs 1 through 21, inclusive.

56. Commencing in or around February, 1986, the Wells Park Investors asserted claims against plaintiffs FSLIC, ADC Financial and Wells Park in connection with their investment in the Wells Park Offering.

57. As a result of the claims by the Wells Park Investors, and in the reasonable belief that plaintiffs FSLIC, ADC Financial and Wells Park were potentially liable to those investors, plaintiffs rescinded the Wells Park Offering and repaid to the Wells Park Investors the amount of their investments, plus interest thereon, in the total amount of \$1,273,164.

58. An actual controversy has arisen and now exists between plaintiffs FSLIC, ADC Financial and Wells Park, on the one hand, and defendant O'Melveny & Myers, on the other hand, in that plaintiffs contend, and defendant O'Melveny & Myers denies, the following:

(a) That as between plaintiffs and defendant O'Melveny & Myers, responsibility for the damages paid by plaintiffs to the Wells Park Investors rests entirely or partially on defendant O'Melveny & Myers; and

(b) That as a result, defendant O'Melveny & Myers is obligated to partially indemnify or fully indemnify plaintiffs for the sum of \$1,273,164 paid to the Wells Park Investors in satisfaction of their

potential claims in connection with the Wells Park Offering.

59. Plaintiffs desire a judicial determination of the respective rights and duties of plaintiffs and defendant O'Melveny & Myers with respect to the damages paid by plaintiffs to the Wells Park Investors. In particular, plaintiffs desire a declaration of the respective liabilities of plaintiffs and defendant O'Melveny for those damages, and a declaration of O'Melveny & Myers' responsibility to indemnify plaintiffs for the sums it has paid to the Wells Park Investors and for which O'Melveny & Myers is determined responsible.

COUNT VIII

COMPARATIVE EQUITABLE INDEMNITY AND CONTRIBUTION IN CONNECTION WITH THE GATEWAY CENTER OFFERING

60. Plaintiffs FSLIC, ADC Financial and Gateway Center incorporate by this reference the allegations set forth in paragraphs 1 through 10 and paragraphs 22 through 32, inclusive.

61. Commencing in or around February, 1986, the Gateway Center Investors asserted claims against plaintiffs FSLIC, ADC Financial and Gateway Center in connection with their investment in the Gateway Center Offering.

62. As a result of the claims by the Gateway Center Investors, and in the reasonable belief that plaintiffs FSLIC, ADC Financial and Gateway Center were potentially liable to those investors, plaintiffs rescinded the Gateway Center Offering and repaid to the Gateway Center Investors the amount of their investments, plus interest thereon, in the total amount of \$1,473,101.

63. An actual controversy has arisen and now exists between plaintiffs FSLIC, ADC Financial and Gateway

Center, on the one hand, and defendant O'Melveny & Myers on the other hand, in that plaintiffs contend, and defendant O'Melveny & Myers denies, the following:

(a) That as between plaintiffs and defendant O'Melveny & Myers, responsibility for the damages paid by plaintiffs to the Gateway Center Investors rests entirely or partially on defendant O'Melveny & Myers; and

(b) That as a result, defendant O'Melveny & Myers is obligated to partially indemnify or fully indemnify plaintiffs for the sum of \$1,473,101 paid to the Gateway Center Investors in satisfaction of their potential claims in connection with the Gateway Center Offering.

64. Plaintiffs desire a judicial determination of the respective rights and duties of plaintiffs and defendant O'Melveny & Myers with respect to the damages paid by plaintiffs to the Gateway Center Investors. In particular, plaintiffs desire a declaration of the respective liabilities of plaintiffs and defendant O'Melveny for those damages and a declaration of O'Melveny & Myers' responsibility to indemnify plaintiffs for the sums it has paid to the Gateway Center Investors and for which O'Melveny & Myers is determined responsible.

WHEREFORE, plaintiffs pray for judgment against defendant O'Melveny & Myers, as follows:

1. ON COUNT I

- a. That judgment be entered for plaintiffs ADC Financial, Wells Park and FSLIC in amounts according to proof at trial;
- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the court may deem proper.

2. ON COUNT II

- a. That judgment be entered for plaintiffs ADC Financial, Gateway Center and FSLIC in amounts according to proof at trial;
- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the court may deem proper.

3. ON COUNT III

- a. That judgment be entered for plaintiff FSLIC in an amount according to proof at trial;
- b. That plaintiff FSLIC be granted its costs of suit; and
- c. For such other and further relief as the court may deem proper.

4. ON COUNT IV

- a. That judgment be entered for plaintiff FSLIC in an amount according to proof at trial;
- b. That plaintiff FSLIC be granted its costs of suit; and
- c. For such other and further relief as the court may deem proper.

5. ON COUNT V

- a. That judgment be entered for plaintiffs ADC Financial, Wells Park and FSLIC in amounts according to proof at trial;
- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the court may deem proper.

6. ON COUNT VI

- a. That judgment be entered for plaintiffs ADC Financial, Gateway Center and FSLIC in amounts according to proof at trial;

- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the court may deem proper.

7. ON COUNT VII

- a. That judgment be entered for plaintiffs ADC Financial and Wells Park in amounts according to proof at trial;
- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the Court may deem proper.

7. ON COUNT VIII

- a. That judgment be entered for plaintiffs ADC Financial and Gateway Center in amounts according to proof at trial;
- b. That plaintiffs be granted their costs of suit; and
- c. For such other and further relief as the Court may deem proper.

DATED: May 12, 1989

JORDAN LUKE
 JACK D. SMITH
 DOROTHY L. NICHOLS
 ANNE BUXTON SOBOL
 CATHERINE RIBNICK
 OFFICE OF THE GENERAL COUNSEL
 FEDERAL HOME LOAN BANK BOARD

PETTIT & MARTIN
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 WILLIAM R. HARMSEN
 SHARON L. O'GRADY

By /s/ **Sharon L. O'Grady by SEF**
SHARON L. O'GRADY
Attorneys for Plaintiff Federal
Savings and Loan Insurance
Corporation As Receiver for
American Diversified Savings Bank,
ADC Financial Corporation,
American Diversified/Wells Park II
and American Diversified/Gateway
Center

JURY DEMAND
Plaintiff demands a trial by jury.
DATED: May 12, 1989

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SHARON L. O'GRADY

By /s/ **Sharon L. O'Grady by SEF**
SHARON L. O'GRADY
Attorneys for Plaintiff Federal
Savings and Loan Insurance
Corporation As Receiver for
American Diversified Savings Bank,
ADC Financial Corporation,
American Diversified/Wells Park II
and American Diversified/Gateway
Center

[Filed July 13, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

**ANSWER AND COUNTERCLAIMS OF
DEFENDANT AND COUNTERCLAIMANT
O'MELVENY & MYERS TO COMPLAINT**

Defendant O'Melveny & Myers ("O'Melveny") for itself alone, answers the Complaint herein by responding to the numbered paragraphs thereof and setting forth its affirmative defenses, counterclaims and prayer for relief as follows:

1. Answering Paragraph 1, O'Melveny admits that this Court has jurisdiction over the subject matter of this action.

2. Answering Paragraph 2, O'Melveny admits that venue is proper in this judicial district. O'Melveny admits that it performs legal services in Orange County, California. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 2.

3. Answering Paragraph 3, O'Melveny admits that the Federal Savings and Loan Insurance Corporation ("FSLIC") is a corporation organized and existing under and by virtue of the laws of the United States; that FSLIC is an instrumentality of the United States and operates under the direction of the Federal Home Loan Bank Board ("FHLBB"); and that FSLIC's conduct is governed by various statutes and regulations. Except as herein expressly admitted, O'Melveny denies each and every allegation contained in Paragraph 3.

4. Answering Paragraph 4, O'Melveny admits the allegations in Paragraph 4.

5. Answering Paragraph 5, O'Melveny admits that on or about February 14, 1986, FHLBB appointed FSLIC as conservator for ADSB, and that as such, FSLIC has certain rights and responsibilities. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5, and for that reason denies each and every allegation therein contained.

6. Answering Paragraph 6, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6, and for that reason denies each and every allegation therein contained.

7. Answering Paragraph 7, O'Melveny admits that sometime in June 1988, FHLBB appointed FSLIC as Receiver for ADSB, and that as such, FSLIC has certain rights and responsibilities. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and for that reason denies each and every allegation therein contained.

8. Answering Paragraph 8, O'Melveny admits that American Diversified Capital Corporation ("ADCC") is and at all times relevant hereto was a wholly-owned subsidiary of ADSB. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and for that reason denies each and every allegation therein contained.

9. Answering Paragraph 9, O'Melveny admits that ADC Financial Corporation ("ADCFC") is, and at all time relevant hereto, was a corporation organized and existing under the laws of the state of California with its principal place of business in Costa Mesa, California. O'Melveny admits that ADCFC is, and at all times relevant hereto, was the general partner in each of two real

estate private placements: American Diversified/Wells Park II ("Wells Park") and American Diversified/Gateway Center ("Gateway Center"). O'Melveny admits that each of Wells Park and Gateway Center is and, at all times relevant hereto, was a limited partnership organized and existing under the laws of the State of California. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and for that reason denies each and every allegation therein contained.

10. Answering Paragraph 10, O'Melveny admits that it is a law partnership that has an office and does business in Orange County, California and that in 1985 it was retained by ADCFC and/or certain of its affiliates to assist in the preparation of two private placement memoranda. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 10.

11. Answering Paragraph 11, O'Melveny admits that as stated in the Wells Park PPM, Wells Park was intended to be involved in the ownership and operation of certain real estate. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11, and for that reason denies each and every allegation therein contained.

12. Answering Paragraph 12, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12, and for that reason denies each and every allegation therein contained.

13. Answering Paragraph 13, O'Melveny admits that it assisted in the preparation of the Wells Park PPM. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 13.

14. Answering Paragraph 14, O'Melveny alleges that the Wells Park PPM is the best evidence of its contents,

and denies all allegations inconsistent therewith; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 14.

15. Answering Paragraph 15, O'Melveny denies each and every allegation in Paragraph 15.

16. Answering Paragraph 16, O'Melveny admits that the Wells Park PPM fully disclosed the risk factors associated with the Wells Park placement; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 16.

17. Answering Paragraph 17, O'Melveny alleges that certain information about ADSB and/or its affiliates was not disclosed to O'Melveny by any of FSLIC, ADSB, ADCFC, or any of their respective affiliates; except as herein expressly alleged, O'Melveny denies each and every allegation in Paragraph 17.

18. Answering Paragraph 18, O'Melveny admits that it did not contact the law firm, Rogers & Wells, in connection with the preparation of the Wells Park PPM; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 18.

19. Answering Paragraph 19, O'Melveny admits that the "Wells Park Rescission Offer" is the best evidence of its contents, and denies all allegations inconsistent therewith; O'Melveny alleges that rescinding investors received the principal amount of their investment, plus interest, and that their claims for relief, if any, were thereby satisfied and extinguished. Except as herein expressly admitted and alleged, O'Melveny denies each and every allegation in Paragraph 19.

20. Answering Paragraph 20, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 20, and for that reason denies each and every allegation therein contained.

21. Answering Paragraph 21, O'Melveny admits that the written agreements regarding the limited waiver of unexpired statute of limitation defenses are the best evidence of their contents, and denies all allegations inconsistent therewith; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 21.

22. Answering Paragraph 22, O'Melveny admits that as stated in the Gateway Center PPM, Gateway Center was intended to be involved in the ownership and operation of certain real estate. Except as herein expressly admitted, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22, and for that reason denies each and every allegation therein contained.

23. Answering Paragraph 23, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23, and for that reason denies each and every allegation therein contained.

24. Answering Paragraph 24, O'Melveny admits that it assisted in the preparation of the Gateway Center PPM. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 24.

25. Answering Paragraph 25, O'Melveny alleges that the Gateway Center PPM is the best evidence of its contents, and denies all allegations inconsistent therewith; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 25.

26. Answering Paragraph 26, O'Melveny denies each and every allegation in Paragraph 26.

27. Answering Paragraph 27, O'Melveny admits that the Gateway Center PPM fully disclosed the risk factors associated with the Gateway Center placement; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 27.

28. Answering Paragraph 28, O'Melveny alleges that certain information about ADSB and/or its affiliates was not disclosed to O'Melveny by any of FSLIC, ADSB, ADCFC, or any of their respective affiliates; except as herein expressly alleged, O'Melveny denies each and every allegation in Paragraph 28.

29. Answering Paragraph 29, O'Melveny admits that it did not contact the law firm, Rogers & Wells, in connection with the preparation of the Gateway Center PPM; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 29.

30. Answering Paragraph 30, O'Melveny admits that the "Gateway Center Rescission Offer" is the best evidence of its contents, and denies all allegations inconsistent therewith; O'Melveny alleges that the rescinding investors received the principal amount of their investment, plus interest, and that their claims for relief, if any, were thereby satisfied and extinguished. Except as herein expressly admitted and alleged, O'Melveny denies each and every allegation in Paragraph 30.

31. Answering Paragraph 31, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 31, and for that reason denies each and every allegation therein contained.

32. Answering Paragraph 32, O'Melveny admits that the written agreements regarding the limited waiver of unexpired statute of limitation defenses are the best evidence of their contents, and denies all allegations inconsistent therewith; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 32.

ANSWER TO FIRST PURPORTED CLAIM

33. Answering Paragraph 33, O'Melveny hereby incorporates its answers to Paragraphs 1 through 21 herein.

34. Answering Paragraph 34, O'Melveny admits that in 1985, it was retained by ADCFC and/or certain of its affiliates to assist in the preparation of the Wells Park PPM. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 34.

35. Answering Paragraph 35, O'Melveny admits that as legal counsel assisting in the preparation of the Wells Park PPM, it owed its client a duty to use such skills, prudence and diligence as other members of the legal profession practicing in that area commonly possess and exercise; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 35.

36. Answering Paragraph 36, O'Melveny denies each and every allegation in Paragraph 36.

37. Answering Paragraph 37, O'Melveny denies each and every allegation in Paragraph 37 and specifically denies that plaintiffs have been damaged in any amount whatsoever.

ANSWER TO SECOND PURPORTED CLAIM

38. Answering Paragraph 38, O'Melveny hereby incorporates its answers to Paragraphs 1 through 10 and 22 through 32 herein.

39. O'Melveny admits that in 1985, it was retained by ADCFC and/or certain of its affiliates to assist in the preparation of the Gateway Center PPM. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 39.

40. Answering Paragraph 40, O'Melveny admits that as legal counsel assisting in the preparation of the Gateway Center PPM, it owed its client a duty to use such

skill, prudence and diligence as other members of the legal profession practicing in that area commonly possess and exercise; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 40.

41. Answering Paragraph 41, O'Melveny denies each and every allegation in Paragraph 41.

42. Answering Paragraph 42, O'Melveny denies each and every allegation in Paragraph 42 and specifically denies that plaintiffs have been damaged in any amount whatsoever.

ANSWER TO THIRD PURPORTED CLAIM

43. Answering Paragraph 43, O'Melveny hereby incorporates its answers to Paragraphs 1 through 21 herein.

44. Answering Paragraph 44, O'Melveny denies each and every allegation in Paragraph 44.

45. Answering Paragraph 45, O'Melveny denies each and every allegation in Paragraph 45 and specifically denies that plaintiffs have been damaged in any amount whatsoever.

ANSWER TO FOURTH PURPORTED CLAIM

46. Answering Paragraph 46, O'Melveny hereby incorporates its answers to Paragraph 1 through 10 and 22 through 32 herein.

47. Answering Paragraph 47, O'Melveny denies each and every allegation in Paragraph 47.

48. Answering Paragraph 48, O'Melveny denies each and every allegation in Paragraph 48 and specifically denies that plaintiffs have been damaged in any amount whatsoever.

ANSWER TO FIFTH PURPORTED CLAIM

49. Answering Paragraph 49, O'Melveny hereby incorporates its answers to Paragraphs 1 through 21 herein.

50. Answering Paragraph 50, O'Melveny admits that it owed its client a duty to use such skill, prudence and diligence as other members of the legal profession practicing in that area commonly possess and exercise; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 50.

51. Answering Paragraph 51, O'Melveny denies each and every allegation in Paragraph 51 and specifically denies that plaintiffs have been damaged in any amount.

ANSWER TO SIXTH PURPORTED CLAIM

52. Answering Paragraph 52, O'Melveny hereby incorporates its answers to Paragraphs 1 through 10 and 22 through 32 herein.

53. Answering Paragraph 53, O'Melveny admits that it owed its client a duty to use such skill, prudence and diligence as other members of the legal profession practicing in that area commonly possess and exercise; except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 53.

54. Answering Paragraph 54, O'Melveny denies each and every allegation in Paragraph 54 and specifically denies that plaintiffs have been damaged in any amount whatsoever.

ANSWER TO SEVENTH PURPORTED CLAIM

55. Answering Paragraph 55, O'Melveny hereby incorporates its answers to Paragraphs 1 through 21 herein.

56. Answering Paragraph 56, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 56, and for that reason denies each and every allegation therein contained.

57. Answering Paragraph 57, O'Melveny admits that plaintiffs rescinded the Wells Park Offering in the belief

that they (the plaintiffs) were potentially liable to the Wells Park Investors and, that plaintiffs returned to the Wells Park Investors the amount of their respective investments plus interest thereon. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 57.

58. Answering Paragraph 58, O'Melveny alleges that plaintiffs' return to the Wells Park Investors fully satisfied and extinguished the Wells Park Investors' claims, if any; and O'Melveny denies that plaintiffs were damaged in any amount whatsoever. Except as herein expressly alleged and denied, O'Melveny admits each and every other allegation in Paragraph 58.

59. Answering Paragraph 59, O'Melveny denies that O'Melveny is responsible for plaintiffs' damages, if any; that O'Melveny is responsible to partially or fully indemnify plaintiffs for the amounts returned to the Wells Park Investors, or that plaintiffs are entitled to any relief whatsoever. Except as herein expressly denied, O'Melveny admits each and every other allegation in Paragraph 59.

ANSWER TO EIGHTH PURPORTED CLAIM

60. Answering Paragraph 60, O'Melveny hereby incorporates its answers to Paragraphs 1 through 10 and 22 through 32 herein.

61. Answering Paragraph 61, O'Melveny is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 61, and for that reason denies each and every allegation therein contained.

62. Answering Paragraph 62, O'Melveny admits that plaintiffs rescinded the Gateway Center Offering in the belief that they (the plaintiffs) were potentially liable to the Gateway Center Investors and, that plaintiffs returned to the Gateway Center Investors the amount of their

respective investments plus interest thereon. Except as herein expressly admitted, O'Melveny denies each and every allegation in Paragraph 62.

63. Answering Paragraph 63, O'Melveny alleges that plaintiffs' return to the Gateway Center Investors fully satisfied and extinguished the Gateway Center Investors' claims, if any, and O'Melveny denies that plaintiffs were damaged in any amount whatsoever. Except as herein expressly denied and alleged, O'Melveny admits each and every other allegation in Paragraph 63.

64. Answering Paragraph 64, O'Melveny denies that O'Melveny is responsible for plaintiffs' damages, if any; that O'Melveny is responsible to partially or fully indemnify plaintiffs for the amounts returned to the Gateway Center Investors; or that plaintiffs are entitled to any relief whatsoever. Except as herein expressly denied, O'Melveny admits each and every other allegation in Paragraph 64.

FIRST AFFIRMATIVE DEFENSE

65. The Complaint fails to state any claim upon which relief can be granted, either in law or equity.

SECOND AFFIRMATIVE DEFENSE

66. Plaintiffs did not suffer any damage and any damages alleged are attributable to causes other than any asserted acts or omissions of O'Melveny.

THIRD AFFIRMATIVE DEFENSE

67. Plaintiffs are barred from bringing claims on behalf of investors in the Wells Park II and Gateway Center limited partnerships because said investors were made whole when the transactions were rescinded and therefore had no claims to assign. Since said investors' purported claims have been fully satisfied and are extinguished, they cannot be asserted by FSLIC or any other person.

FOURTH AFFIRMATIVE DEFENSE

68. The intentional wrongdoing of the officers and directors of ADSB and/or certain of its affiliates, including among other things, their fraud, mismanagement of ADSB, and misrepresentations about ADSB's financial and regulatory condition, is imputed to ADSB and/or certain of its affiliates. Such intentional wrongdoing bars plaintiffs from maintaining any claims for relief against O'Melveny.

FIFTH AFFIRMATIVE DEFENSE

69. Plaintiffs were aware of or had actual knowledge of the information that O'Melveny purportedly should have uncovered, and plaintiffs negligently or intentionally failed to disclose said information to O'Melveny. Accordingly, plaintiffs are liable to O'Melveny for contribution or are required to indemnify O'Melveny.

SIXTH AFFIRMATIVE DEFENSE

70. Plaintiffs are estopped from asserting any claims for relief against O'Melveny because they were aware or reasonably should have been aware of the information that O'Melveny allegedly should have discovered, and they negligently or intentionally failed to disclose said information to O'Melveny.

SEVENTH AFFIRMATIVE DEFENSE

71. Plaintiffs' own criminal or intentionally tortious conduct, not O'Melveny's alleged negligence, if any, was the cause of plaintiffs' alleged damage.

EIGHTH AFFIRMATIVE DEFENSE

72. Plaintiffs' Complaint is uncertain in that it seems to allege that ADSB and its affiliates are separate and distinct from the persons who own and manage them, and that O'Melveny can be liable to the corporate entity

notwithstanding the misleading, fraudulent and wrongful conduct engaged in by the entity's owners and managers. O'Melveny denies this formulation by plaintiffs; however, if there is a distinction between the owners and management and the corporate entity itself, FSLIC owes a duty to the corporate entity to inform said entity in an effective manner of its orders, requirements and regulations. In order to communicate in an effective manner, FSLIC, because it knew or reasonably should have known of the improprieties, misconduct and fraud of the owners and managers of ADSB and its affiliates had a non-discretionary duty to advise persons who would protect the corporate entity of said orders, requirements and regulations. Accordingly, FSLIC had a duty either to inform O'Melveny of its orders, requirements, and regulations or to require the owners and management of ADSB and its affiliates to so inform O'Melveny. This duty FSLIC negligently violated.

NINTH AFFIRMATIVE DEFENSE

73. Plaintiffs are barred from maintaining any claims for relief against O'Melveny because O'Melveny owed no duty to them to uncover their own fraud, wrongdoing or misconduct.

TENTH AFFIRMATIVE DEFENSE

74. Plaintiffs are barred from maintaining any claims for relief against O'Melveny because O'Melveny's purported negligence, negligent misrepresentation, or breach of fiduciary duty, if any, was not the proximate cause of plaintiffs' alleged damage, if any.

ELEVENTH AFFIRMATIVE DEFENSE

75. O'Melveny owed no duty to any of: the Wells Park II limited partnership, the Gateway Center limited partnership, the investors in Wells Park II, or the investors in Gateway Center, and therefore such persons or

entities are barred from asserting any claims for relief against O'Melveny.

TWELFTH AFFIRMATIVE DEFENSE

76. The Gateway Center investors and Wells Park II investors did not rely on the Gateway Center and Wells Park II PPMs in making their investment decisions, and therefore such investors cannot state any claims for relief against O'Melveny.

THIRTEENTH AFFIRMATIVE DEFENSE

77. Plaintiffs' Complaint is uncertain it [sic] that it seems to allege that FSLIC is not merely the successor in interest to ADSB, and as such, entitled to assert ADSB's claims, if any, but also that it has the right to assert claims in its own right that ADSB could not assert. O'Melveny denies this formulation by plaintiffs; however, if there is such a distinction, FSLIC is barred from asserting any claims in its own right against O'Melveny because it knew or reasonably should have known the information O'Melveny purportedly should have uncovered, and thus FSLIC itself, not O'Melveny caused its own purported damage, if any.

FOURTEENTH AFFIRMATIVE DEFENSE

78. The claims asserted in the Complaint herein are barred by reason of laches.

FIFTEENTH AFFIRMATIVE DEFENSE

79. Plaintiffs have waived each and every purported claim in their Complaint.

SIXTEENTH AFFIRMATIVE DEFENSE

80. Plaintiffs' purported claims for relief are barred in whole or in part by the applicable statutes of limitations.

SEVENTEENTH AFFIRMATIVE DEFENSE

81. Plaintiffs' purported claims for relief are barred by the Statute of Frauds, Section 1974 of the California Code of Civil Procedure.

EIGHTEENTH AFFIRMATIVE DEFENSE

82. Plaintiffs' purported claims for relief and each of them are barred by plaintiffs' unclean hands in that plaintiffs knew or reasonably should have known all of the purported facts and information that O'Melveny allegedly was to uncover, and concealed or failed to disclose such purported facts and information from O'Melveny.

NINETEENTH AFFIRMATIVE DEFENSE

83. O'Melveny relied to its detriment on the actions of plaintiffs and plaintiffs are thereby estopped from asserting any of the claims contained in the Complaint.

COUNTERCLAIMS

Counterclaimant O'Melveny & Myers ("O'Melveny") alleges as follows:

JURISDICTION AND VENUE

1. This Court has ancillary jurisdiction over these counterclaims in that the claims contained herein are compulsory counterclaims to the purported claims in the Complaint. The amount in controversy exceeds the jurisdictional amount of this Court. Venue is proper in this Court pursuant to 28 U.S.C. § 1331 in that the counterclaims arose in this district and counterclaimant resides in the Central District of California.

PARTIES

2. Counterclaimant O'Melveny & Myers ("O'Melveny") is, and at all times relevant hereto, was a partnership engaged in the practice of law, having its principal

place of business in Los Angeles, California. O'Melveny has filed and published a fictitious business name statement as required by Sections 17910 through 17917 of California Business and Professions Code.

3. O'Melveny is informed and believes and thereon alleges that counterdefendant Federal Savings and Loan Insurance Corporation ("FSLIC") is, and at all times relevant hereto, was a corporation organized and existing under and by virtue of the laws of the United States. O'Melveny is informed and believes and thereon alleges that FSLIC is an instrumentality of the United States and operates under the direction of the Federal Home Loan Bank Board ("FHLBB").

4. O'Melveny is informed and believes and thereon alleges that American Diversified Savings Bank ("ADSB") is, and at all times relevant hereto, was a savings and loan association chartered under the laws of the State of California, whose deposits are insured by FSLIC. O'Melveny is informed and believes and thereon alleges that ADSB has and at all times relevant hereto has had its principal place of business in Costa Mesa, California. O'Melveny is informed and believes and thereon alleges that on or about February 14, 1986, FHLBB appointed FSLIC as Conservator for ADSB and that on or about June 6, 1988, FHLBB appointed FSLIC as Receiver for ADSB.

5. O'Melveny is informed and believes and thereon alleges that counterdefendant ADC Financial Corporation ("ADCFC") is, and at all times relevant hereto, was a corporation organized and existing under the laws of the State of California with its principal place of business in Costa Mesa, California. O'Melveny is informed and believes and thereon alleges that ADCFC is wholly owned by American Diversified Capital Corporation ("ADCC"), a corporation which, in turn, is wholly owned by ADSB. O'Melveny is informed and believes and thereon alleges that ADCFC is, and at all times relevant

hereto, was the general partner in each of two real estate private placements: American Diversified/Wells Park II ("Wells Park") and American Diversified/Gateway Center ("Gateway Center"). O'Melveny is informed and believes and thereon alleges that each of Wells Park and Gateway Center is and, at all times relevant hereto, was a limited partnership organized and existing under the laws of the State of California.

FIRST COUNTERCLAIM

(Breach of Contract)

6. O'Melveny repeats and incorporates herein by this reference as though set forth in full each and every allegation of Paragraphs 1 through 5, inclusive.

7. On or about September 1985, O'Melveny and ADCFC and/or certain of its affiliates entered into an oral agreement (the "Agreement") whereby O'Melveny agreed to assist ADCFC and/or certain of its affiliates in connection with the preparation of private placement memoranda ("PPMs") for real estate limited partnership offerings including Wells Park and Gateway Center, to render tax opinions for the placements, and to perform such other legal services as ADCFC or certain of its affiliates might, from time to time, require and to which O'Melveny might agree. ADSB and/or certain of its affiliates agreed to compensate O'Melveny for all legal services rendered on its behalf or on behalf of any of said affiliates, including ADCFC, and to reimburse O'Melveny for costs incurred on its behalf or on behalf of said affiliates, in amounts to be specified in periodic statements from O'Melveny.

8. Pursuant to the Agreement, O'Melveny diligently represented ADCFC and/or certain of its affiliates in connection with, among other things, preparation of private placement memoranda and tax opinions.

9. O'Melveny has performed all acts, services and conditions precedent required of it under the Agreement.

10. The value of the services, costs, and expenses herein alleged, as specified in statements to ADSB by O'Melveny is \$38,965.08.

11. O'Melveny has made demand on ADSB and/or certain of its affiliates, and FSLIC, as Receiver for ADSB, for payment of compensation for legal services rendered and for reimbursement of cost and expenses (other than those amounts already paid) in the total sum of \$38,965.08.

12. ADSB and/or certain of its affiliates, and FSLIC, as Receiver for ADSB, breached and continue to breach the Agreement by failing to make payment to O'Melveny of the amount owed for legal services rendered by O'Melveny and for costs and expenses incurred by O'Melveny on behalf of ADCFC and/or certain of its affiliates. The amount of \$38,965.08 remains due, owing and unpaid for legal services rendered and for reimbursement of costs and expenses.

13. As a result of the foregoing breach of the Agreement, O'Melveny has been damaged in the total amount of \$38,965.08.

SECOND COUNTERCLAIM

(Account Stated)

14. O'Melveny repeats and incorporates herein by this reference as though set forth in full each and every allegation of Paragraphs 1 through 13, inclusive.

15. Between September, 1985, and March, 1986, O'Melveny performed services for counterdefendants as their attorney in various legal matters, and advanced and paid out sums of money for the account and benefit of counterdefendants, all at counterdefendants' instance and request.

16. Within four years last past, at Newport Beach, California, an account was stated in writing by and between O'Melveny and ADSB and/or certain of its affil-

iates wherein it was agreed that ADSB and/or certain of its affiliates were indebted to O'Melveny in the sum of \$38,965.08.

17. No part of said sum has been paid, although demand therefor has been made, and there is now due, owing and unpaid the sum of \$38,965.08, together with interest thereon at the maximum allowable rate of interest per year.

WHEREFORE, defendant and counterclaimant O'Melveny & Myers prays as follows:

- A. That the Complaint be dismissed;
- B. That plaintiffs take nothing in this action;
- C. That in the event declaratory relief is granted, the Court declare the rights and duties of the parties to be as O'Melveny contends rather than as plaintiffs contend;
- D. That judgment in favor of O'Melveny & Myers be entered on its Counterclaims in the sum of \$38,965.08 plus interest at the maximum allowable rate of interest per year;
- E. That O'Melveny & Myers have judgment for its costs of suit and its attorneys' fees; and
- F. For such other and further relief as the Court may deem just and proper.

DATED: July 12, 1989.

IRELL & MANELLA
GREGORY R. SMITH
SARA D. LIPSCOMB

By: /s/ Sara D. Lipscomb
SARA D. LIPSCOMB
Attorneys for Defendant
and Counterclaimant
O'Melveny & Myers

(Proof of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

**ANSWER OF COUNTERDEFENDANTS FSLIC AS
RECEIVER FOR ADSB, ET AL., TO
COUNTERCLAIMS OF O'MELVENY AND MYERS
JURY TRIAL DEMANDED**

Counterdefendants Federal Savings and Loan Insurance Corporation as Receiver for American Diversified Savings Bank (hereinafter "FSLIC" as Receiver for ADSB"), ADC Financial Corporation (hereinafter "ADC Financial"), American Diversified/Wells Park II (hereinafter "Wells Park"), and American Diversified/Gateway Center (hereinafter "Gateway Center") and Federal Savings and Loan Insurance Corporation ("FSLIC") (hereinafter all collectively referred to as "Counterdefendants") answer the counterclaims of O'Melveny & Myers ("O'Melveny") (hereinafter the "Counterclaim") as follows:

FIRST AFFIRMATIVE DEFENSE

1. Answering the allegations of paragraph 1 of the Counterclaim, Counterdefendants admit that the claims contained in the Counterclaim purport to be compulsory counterclaims; that O'Melveny purports to invoke the jurisdiction of this Court under the principles alleged; that the counterclaims purportedly arose in this district; that O'Melveny resides in this district; and that O'Melveny purports to invoke the venue of this court under the statutes and principles alleged. Except as expressly admitted, Counterdefendants deny each and every allegation of paragraph 1 of the Counterclaim.

2. Answering the allegations of paragraph 2 of the Counterclaim, Counterdefendants admit that O'Melveny & Myers is, and, at all relevant times, was a partnership engaged in the practice of law, and that O'Melveny purports to have its principal place of business in Los Angeles, California. Except as expressly admitted, Counterdefendants lack sufficient knowledge or information to form a belief as to truth of the rest of the allegations, and on that basis deny each and every allegation contained in paragraph 2 of the Counterclaim.

3. Answering the allegations of paragraph 3 of the Counterclaim, Counterdefendants admit that counterdefendant FSLIC is, and, at all relevant times, was a corporation organized and existing under and by virtue of the laws of the United States; that FSLIC is an instrumentality of the United States and that FSLIC operates under the direction of the Federal Home Loan Bank Board ("FHLBB").

4. Answering the allegations of paragraph 4 of the Counterclaim, Counterdefendants admit that ADSB was a savings and loan association chartered under the laws of the State of California; that certain of ADSB's deposits were insured by FSLIC; that, at all relevant times, ADSB had its principal place of business in Costa Mesa, California; that on or about February 14, 1986, the FHLBB appointed FSLIC as Conservator of ADSB; and that on or about June 3, 1988, the FHLBB appointed FSLIC as Receiver for ADSB. Except as expressly admitted, Counterdefendants deny each and every allegation contained in paragraph 4 of the Counterclaim.

5. Answering the allegations of paragraph 5 of the Counterclaim, Counterdefendants admit that ADC Financial is, and at all relevant times, was a corporation organized and existing under the laws of the State of California; that at all relevant times, its principal place of business was in Costa Mesa, California; that ADC Financial is wholly owned by American Diversified Capital

Corporation ("ADCC"); that ADCC is wholly owned by ADSB; that ADC Financial is, and, at all relevant times, was the general partner in Wells Park and Gateway Center; that limited partnership units in Wells Park and Gateway Center were offered for sale to investors pursuant to private placement memoranda; and that Wells Park and Gateway Center are, and at all relevant times, were limited partnerships organized and existing under the laws of the State of California. Except as expressly admitted, Counterdefendants deny each and every allegation contained in paragraph 5 of the Counterclaim.

FIRST COUNTERCLAIM

(Breach of Contract)

6. Answering paragraph 6 of the Counterclaim, Counterdefendants hereby incorporate by reference their answers to each of the allegations of paragraphs 1 through 5, inclusive.

7. Answering paragraph 7 of the Counterclaim, Counterdefendants admit that O'Melveny was retained by ADSB, ADC Financial, Wells Park and Gateway Center as special securities counsel and tax counsel with respect to the offerings to potential investors of limited partnership units in Wells Park and Gateway Center. Except as expressly admitted, Counterdefendants lack sufficient knowledge or information to form a belief as to truth of the rest of the allegations insofar as they were part of the terms of any purported oral agreement between O'Melveny and any ADSB entity or affiliate, and on that basis deny each and every allegation contained in paragraph 7 of the Counterclaim.

8. Answering paragraph 8 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 8 of the Counterclaim.

9. Answering paragraph 9 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 9 of the Counterclaim.

10. Answering paragraph 10 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 10 of the Counterclaim.

11. Answering paragraph 11 of the Counterclaim, Counterdefendants deny that O'Melveny made a demand in the normal course of business on FSLIC as Receiver for ADSB for payment of alleged compensation for legal services rendered and for reimbursement of alleged cost [sic] and expenses (other than those amounts already paid) in the alleged total sum of \$38,965.08. Counterdefendants admit that certain correspondence was received from O'Melveny pertaining to sums allegedly owed to O'Melveny and aver that the documents speak for themselves. Except as expressly admitted, Counterdefendants lack sufficient knowledge or information to form a belief as to truth of the rest of the allegations, and on that basis deny each and every allegation contained in paragraph 11 of the Counterclaim.

12. Answering paragraph 12 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 12 of the Counterclaim.

13. Answering paragraph 13 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 13 of the Counterclaim.

SECOND COUNTERCLAIM

(Account Stated)

14. Answering paragraph 14 of the Counterclaim, Counterdefendants hereby incorporate by reference their answers to each of the allegations of paragraphs 1 through 13, inclusive.

15. Answering paragraph 15 of the Counterclaim, Counterdefendants admit that between September, 1985, and March, 1986, O'Melveny performed services for Counterdefendants as their attorney in various legal matters. Except as expressly admitted, Counterdefendants

deny each and every allegation contained in paragraph 15 of the Counterclaim.

16. Answering paragraph 16 of the Counterclaim, Counterdefendants deny each and every allegation contained in paragraph 16 of the Counterclaim.

17. Answering paragraph 17 of the Counterclaim, Counterdefendants admit that no part of the alleged sum of \$38,965.08 has been paid. Except as expressly admitted, Counterdefendants lack sufficient knowledge or information to form a belief as to truth of the rest of the allegations, and on that basis deny each and every allegation contained in paragraph 17 of the Counterclaim.

SECOND AFFIRMATIVE DEFENSE

Counterdefendants allege that the Counterclaim, and each cause of action contained therein, fail to state a claim against Counterdefendants upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

O'Melveny is barred from recovery against Counterdefendants under the equitable doctrine of unclean hands.

FOURTH AFFIRMATIVE DEFENSE

O'Melveny, as a result of its professional negligence in connection with the legal services it performed for Counterdefendants, is estopped from asserting claims, actions, demands or causes of actions against Counterdefendant.

FIFTH AFFIRMATIVE DEFENSE

O'Melveny is barred from recovery against Counterdefendants under the doctrine of laches in that O'Melveny delayed an unreasonable period of time in bringing this action, to the prejudice of Counterdefendants.

SIXTH AFFIRMATIVE DEFENSE

O'Melveny, by virtue of the history of the attorney-client relationship between O'Melveny and Counterdefendants, and the trust placed in O'Melveny by Counterdefendants, owed Counterdefendants fiduciary duties which it has breached as a result of its conduct in performing legal services for Counterdefendants. O'Melveny's breach of its fiduciary duties to Counterdefendants excuses and discharges Counterdefendants, and each of them, from further obligations, if any, to O'Melveny.

SEVENTH AFFIRMATIVE DEFENSE

O'Melveny has waived each and every purported claim in its Counterclaim.

EIGHTH AFFIRMATIVE DEFENSE

O'Melveny's purported claims for relief are barred in whole or in part by the applicable statutes of limitations.

NINTH AFFIRMATIVE DEFENSE

O'Melveny's purported claims for relief are barred by the Statute of Frauds, Section 1624(a) of the California Civil Code.

TENTH AFFIRMATIVE DEFENSE

The injury or injuries alleged in the Counterclaim, if any, was or were proximately caused by O'Melveny's failure to act in a reasonable and prudent manner.

WHEREFORE, Counterdefendants pray for judgment against O'Melveny as follows:

1. That the Court dismiss the Counterclaim on its merits and with prejudice as to O'Melveny & Myers;
2. That O'Melveny & Myers be adjudged to take nothing by reason of the Counterclaim;

3. That in the event declaratory relief is granted, the Court declare the rights and duties of the parties to be as Counterdefendants contend rather than as O'Melveny & Myers contends;

4. That judgment be awarded in favor of the Counterdefendants against O'Melveny & Myers;

5. That Counterdefendants be awarded their costs of suit incurred herein; and

6. That this Court award such other and further relief as this Court deems just and proper.

DATED: August 5, 1989

PETTIT & MARTIN
THEODORE RUSSELL
WILLIAM R. HARMSEN
SHARON L. O'GRADY
JUDITH L. ANDERSON

By: /s/ Judith L. Anderson
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Attorneys for Plaintiffs and
Counterdefendants Federal
Savings and Loan Insurance
Corporation as Receiver for
American Diversified
Savings Bank, et al.

Of Counsel:
JORDAN LUKE
JACK D. SMITH
DOROTHY L. NICHOLS
CATHERINE RIBNICK

JURY DEMAND

Counterdefendants demand a trial by jury on the counterclaims asserted by O'Melveny & Myers.

DATED: August 5, 1989

PETTIT & MARTIN
THEODORE RUSSELL
WILLIAM R. HARMSEN
SHARON L. O'GRADY
JUDITH L. ANDERSON

By: /s/ **Judith L. Anderson**
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Savings and Loan Insurance
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(Proof of Service by Mail Omitted in Printing)